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November 3, 2000

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Via hand delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: CC Docket No. 00-176

Dear Ms. Salas:

Enclosed for filing in the above-referenced docked is confidential exhibit G, Declaration of Dennis Schmidt, which is part of the reply comments of Covad Communications Company. Covad is also filing this Declaration in a redacted form. This document is being provided pursuant to the Protective Order released September 22, 2000 in this proceeding.

Any parties seeking access to these documents should contact the undersigned at 202-220-0409.

Very truly yours,

Jason Oxman

Jason Oxman
Senior Government Affairs Counsel

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), And Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts	)	CC Docket No. 00-176

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

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The Department of Justice agrees with Covad that the Commission cannot approve this application and cannot accept Verizon's "excuses."

The most important development since comments were filed in this proceeding is, of course, the Department of Justice's conclusion that the Commission cannot approve Verizon's application based on the current record. "The Department has concluded that Verizon has not yet demonstrated (1) that it provides nondiscriminatory access to DSL loops, and (2) that suitable performance measures with unambiguous benchmarks are in place to deter backsliding. The Commission should not approve this application without such a demonstration."[1]

But the Department did more than simply conclude that Verizon had not satisfied its burden of proving nondiscriminatory treatment of DSL providers in Massachsuetts. The Department also concluded that the Commission must not accept the performance metrics as they currently exist in Massachusetts, because such metrics do not by themselves address the obligations of Verizon. Indeed, the Department highlighted the danger to competition that would result if the Commission lowered the bar for long distance entry by relying on these metrics. "To the extent that the Massachusetts performance measures do not accurately indicate whether Verizon is providing discriminatory or nondiscriminatory access to DSL loops, those deficiencies in the performance measures will substantially increase the difficulties of detecting and providing remedies for any discriminatory performance that may arise in the future."[2]

[1] Department of Justice Evaluation at 2-3.
[2] DOJ Evaluation at 14. Even more crucial, as the Department concluded, Verizon decided to file its application before linesharing metrics were in place, so the Commission has no reliable measure of Verizon's linesharing performance. DOJ Evaluation at 16.

As Covad argued in extensive detail in its initial comments, there are serious problems plaguing Covad in its efforts to compete against Verizon in Massachusetts. In the loop delivery arena, Verizon's own statistics demonstrate that it provides DSL loops on time to competitors only 51% of the time. But what that poor performance masks are even greater problems. As Verizon concedes, it faces "no access" problems for its own customers only 3% of the time, while it faces those access problems 59% of the time for its CLEC customers.[3] This occurs, in large part, because Verizon provides its own customers appointment windows of just a couple of hours, whereas it refuses to provide CLEC customers anything other than an "all day" appointment window. Yet these figures are excluded from Verizon's metrics, and the metrics don't tell the whole story. Verizon has never provided Covad, despite repeated requests, with information on whether Verizon exercises nondiscriminatory facilities assignment policies. As a result, Covad faces "no facilities" issues approximately 55 times more often than Verizon does for its own retail customers.[4] Yet facilities issues are excluded from the on-time performance metrics. The Commission cannot simply throw up its hands at these important issues – if the Commission does not require Verizon to fix the no access and facilities issues, rather than continue to exclude them from the metrics and pretend there is not a problem, then the future of competition for DSL is in doubt.

It has not escaped Covad's attention that the Department of Justice has paid particular – indeed, almost exclusive – attention to DSL issues in its evaluation of this and prior recent section 271 applications. There is a simple reason for that. The

3 Verizon Lacouture/Ruesterholz Declaration at para. 106.
[4] PR 5-01 (% missed appointment, Verizon facilities), July 2000, (Verizon .15, CLEC aggregate 2.88).

Department recognizes that DSL is the future of local telecommunications competition.[5] DSL is so important because consumer demand for it is so high, incumbent LECs are devoting incredible resources (including, in Verizon's case, buying a former data CLEC competitor) to shoring up their DSL operations. In the process, the Department is concerned (rightly) that Verizon may be attempting to stamp out DSL competitors in Massachusetts, and the Department clearly believes that Verizon's own performance data shows just that.

In the *Bell Atlantic New York 271 Order*, the Commission stated that it would "examine carefully" the state-adopted performance standards measuring the average provisioning interval, the number of missed installation appointments, and the applicant's maintenance and repair functions in future applications.[6] Indeed, in upholding the Commission's decision in the *New York 271 Order* to approve Bell Atlantic's application without requiring proof on DSL issues, the D.C. Circuit Court stated, "[w]e . . . expect, as did the FCC, that as DSL-capable loops become a larger proportion of unbundled loops, and as performance standards are developed, checklist compliance will require a separate and comprehensive evidentiary showing with respect to the provision of DSL-capable loops."[7]

The Commission is at a crossroads with this application. Should the Commission adhere to its longstanding "complete when filed rule" and reject Verizon's application

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[5] Note, for example, Sprint's announcement today (November 3, 2000) that it is exiting the local CLEC business. "Sprint, on earnings warning, is latest to shift to date from voice," *CNET News.com*, Nov. 3, 2000, at 1 ("Sprint also announced on Friday that it will abandon its efforts to launch local phone service using Bell-based circuit-switched technology."), available at http://yahoo.cnet.com/news/0-1004-200-3372873.html?pt.yfin.cat_fin.txt.ne.

[6] See *Bell Atlantic New York 271 Order* at paras. 316, 333, 335. The Commission made the same conclusion in the SWBT Texas 271 Order. *See id.* at para. 282.

[7] *AT&T Corp. v. FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000) (quoting *Bell Atlantic New York 271 Order* at para. 330).

because, as the Department of Justice concluded, Verizon is discriminating against DSL CLECs in Massachusetts?[8] Yes. Not only did the Department conclude that Verizon failed to meet its burden on the record, but the Department found fault with the "excuses" Verizon offered to explain away its horribly discriminatory performance in Massachusetts: "The Department has not been able to determine whether Verizon's objections to the performance measures are valid or whether Verizon is providing nondiscriminatory performance even under its suggested alternative methods of measuring performance. We believe, however, that it is appropriate to insist that Verizon satisfy its burden of proof on these issues."[9]

In the Department's view, the Massachusetts DTE did not do its job in this proceeding.[10] Despite direct and clear statements from the Commission that third party

[8] "Under our procedural rules governing BOC section 271 applications, we expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings. An applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application. This includes the submission, on reply, of factual evidence gathered after the initial filing." SWBT Texas 271 Order at para. 35.

[9] DOJ Evaluation at 13.

[10] *See, e.g.* DOJ Evaluation at 8 n.30 ("The MA DTE submitted a detailed evaluation of Verizon's DSL performance concluding that Verizon provides nondiscriminatory access. On several issues, however, the basis for that conclusion is not clear from the MA DTE's submission. For example, is it unclear to what extent the MA DTE based its conclusions about Verizon's DSL installation timeliness and maintenance and repair performance on Verizon's studies of POTS lines. See MA DTE Evaluation at 298-99, 320. It is also unclear whether the MA DTE's conclusion about the adequacy of Verizon's missed installation appointments and maintenance and repair performance relied on newly implemented, but as yet unproven, process improvements including the enhanced capability of Verizon's mechanized database, new cooperative testing procedures, and recently ordered (but not yet tariffed) substitutes for copper facilities. See MA DTE Evaluation at 309-10, 315. In addition, the Department does not know whether the MA DTE's conclusions on Verizon's missed installation appointments performance were based, in part, on the misconception that Verizon retail does not provide the largest share of DSL loops in Massachusetts. See MA DTE Evaluation at 307 n.965. Further, the Department is uncertain how much weight the MA DTE gave to its finding that CLECs did not respond to Verizon's August 2000 assertions that CLECs were accepting non-working loops when it appears that the remaining opportunity for comment may have been limited to oral argument and that CLECs have disputed Verizon's assertion in their initial comments to this Commission. See MA DTE Evaluation at 312; Rhythms Comments at 32-33; Covad Comments at 51-52. The Department is also uncertain whether the MA DTE concluded that CLEC practices had distorted Verizon's current performance data (for loop installations and maintenance and repair) solely on the basis

DSL testing would be strongly preferred, the DTE did not ensure that KPMG did any DSL testing. Indeed, as the Department of Justice concluded, "[a]lthough KPMG reviewed other Verizon performance metrics, it did not test the DSL metrics because they were implemented by Verizon after the initial testing period."[11] In addition, despite equally strong language from the Commission suggesting that independent data validation was vital to a successful application, the Department of Justice found that Verizon refused to permit CLECs to independently check Verizon's unilateral performance reporting: "Verizon has not provided individual CLECs reports that show its performance on their DSL orders. We are not aware of any reason for this omission, and in fact Verizon provides such individual performance reports in New York."[12]

As of the date of these reply comments, Covad has not been contacted by the DTE or Verizon to engage in any data reconciliation whatsoever. Indeed, the Department of Justice concluded that such an effort would be nearly fruitless at this late date, given the last-minute unilateral excuses set forth by Verizon. "[I]t is difficult or impossible to verify Verizon's reformulated performance calculations and analysis because Verizon has

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of CLEC statements in December 1999 (before the DSL joint testing procedures were fully implemented), or whether there is more recent evidence of those CLEC practices. See MA DTE Evaluation at 313-14, 320. Finally, it is unclear how the MA DTE will be able to effectively monitor Verizon's future performance on missed installation appointments without having an established measurement method in place. See MA DTE Evaluation at 307-08.").

[11] DOJ Evaluation at 15.

[12] DOJ Evaluation at 15. Covad finds it particularly galling that Verizon would claim to the Commission that no competitive LEC requested CLEC-specific data in Massachusetts. As far back as July, Covad specifically asked Verizon for Massachusetts-specific data, to which Verizon responded with an emphatic no. Verizon did note that participants in the "consolidated arbitration" in Massachusetts were entitled to CLEC-specific data. That does nothing for Covad for two reasons. First, the consolidated arbitration pre-dated Covad's operation in Massachusetts. Second, even if Covad could access consolidated arbitration data, that data has absolutely no DSL-specific metrics or other reports, so it would not provide any information related to Covad anyway. *See* Attachment A, *infra*, email from Michael Clancy, Covad, to William Smith, Verizon, requesting Covad-specific data for Massachusetts, and response refusing to provide such data to Michael Clancy from Julie Canny, Verizon. It is interesting to note that Covad's request for Massachusetts-specific data was addressed to Verizon's lawyer, and the request was denied by one of Verizon's affiants in this proceeding, giving rise to the question as to how Verizon can claim no such request has ever been made.

not provided the data underlying its reformulated performance calculations and because Verizon has not given the CLECs their individual performance reports, which would be necessary to permit CLECs to verify or refute Verizon's restated performance."[13]

Verizon points in many different directions in an effort to find evidence of nondiscriminatory performance, but all evidence points only to clear discrimination.

This application for long distance authority presents the Commission with a clear choice. Verizon claims that its on time loop performance for DSL loops is consistently in excess of 90%. Indeed, Verizon claims that, for the month of July, 94.64% of the CLEC LSRs submitted ended up receiving loop delivery on the requested due date.[14] "Since Verizon's missed apppointment rate is very low," Verizon contends, "it is clear that CLECs are getting service when they want it."[15] How did Verizon compile this information, which permits it to claim 95% on time loop delivery? Well, it simply "reviewed all confirmed LSRs for the month of July."[16] So is this 95% on-time claim related only to DSL loops? No, it includes LSRs from "sixty-three CLECs."[17] Do we therefore know from Verizon's unilateral, unverified (by the DTE, KPMG, or other CLECs) internal "review" what Verizon's on-time performance for DSL loops is? No, because its DSL loop performance is aggregated together with every other CLEC LSR. In addition, the sheer number of CLECs included in the "study" – 69 in June, 63 in July – suggests that Verizon is counting LSRs from a wide variety of CLEC orders. For all we know, that figure could include resale, UNE-P, trunks, hot cuts – an incredible variety of CLEC orders. Of course, we don't know, because it is Verizon's unilateral unverified

[13] DOJ Evaluation at 11.
[14] Verizon Guerard/Canny Declaration at para. 77; Attachment J. Verizon also claims 94.64% on-time performance for June, using the same "study" and counting LSRs from 69 different CLECs.
[15] *Id.*

"study." More importantly, what does it exclude? Because this is Verizon's own study, it was able to include and exclude whatever it felt like. In sum, Verizon's aggregated, self-conducted study of all LSRs, which clearly are not solely UNE loop orders, and certainly are not only DSL loop orders, is absolutely useless in determining Verizon's on-time DSL loop performance in Massachusetts.

Verizon's "study" distracts from the real issue. Fortunately, we do know how poorly Verizon performs for DSL loops. We know that because there is a metric in place in Massachusetts that measures Verizon's performance. We know that, pursuant to Verizon's own data, it delivered DSL loops on time only 51% of the time in July 2000.[18] We also know that Verizon excludes from that measure a variety of orders that it feels were late due to circumstances that were not its fault, such as facilities and no access issues – which Verizon classifies as "customer reasons." Thus, Verizon has had the opportunity to "scrub" its performance data to exclude all of the missed installation orders that it feels are not its fault. And even with that scrubbing, it still manages to meet its on-time loop delivery obligations only 51% of the time.

Verizon, of course, has an additional excuse to explain why its loop performance is so poor. Perhaps anticipating that the Commission would see the transparent invalidity of Verizon's obfuscation of the on-time issue through its "study" of the entire universe of CLEC LSRs, Verizon presents an explanation of its 51% on time DSL loop performance. (This metric is, after all, the metric designed by the New York PSC, Verizon, Covad and other competitive LECs to provide data on Verizon's DSL loop performance.) Verizon claims that competitive LECs are requesting manual loop qualification in some instances

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[16] *Id.*
[17] *Id.*

on LSRs, which provides Verizon with a nine-day installation period, rather than the six-day installation period reported under PR 3-10. [19] As a result, Verizon explains, its own internal study of its performance (further excluding the manual loop qualification) shows it is providing on-time loops.

At the outset, this is an area ripe for further Commission inquiry. Verizon states that "CLECs have the choice of using Verizon's loop qualification pre-ordering transaction or asking Verizon to perform a manual loop qualification."[20] Verizon's loop pre-ordering transaction is where, pursuant to the Commission's UNE Remand order, Covad should have access to loop make-up information, such as loop length, number and length of bridged taps, load coils, and other information. Verizon does not provide such loop information in its Livewire prequalification tool. Rather, as detailed in Covad's October 26, 2000 ex parte, Livewire simply applies the parameters of Verizon's own retail DSL service, and provides a "red light, yellow light, green light" response to a prequalification inquiry. Such a response is useful for Verizon's retail representatives, but not for Covad. Thus, Covad does, in certain circumstances, request what Verizon calls a "manual loop qualification" from Verizon. This manual loop qualification involves a Verizon representative looking up information on the loop in Verizon's internal OSS – information that Covad is entitled to access electronically itself, pursuant

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[18] PR 3-10

[19] It is particularly disturbing to see Verizon raise this "excuse" at the very last minute – as the Department of Justice noted in its Evaluation, Verizon didn't even raise this issue before the Massachusetts DTE. Indeed, the first time Covad heard of this unilateral modification to the Verizon's reporting data was in an email sent out by Verizon on September 11, 2000 – a mere 11 days before Verizon filed the instant application. *See* email from Julie Canny, Verizon, to CLEC distribution list, dated Sept. 11, 2000, *infra* at Attachment E. By proposing a modification to its PR 3-10 performance metric on September 11, 2000, Verizon obviously recognized the need to utilize the ongoing collaborative process, which had been established as a forum for modifying such metrics. Instead of awaiting the outcome of that established process, however, Verizon chose to file the instant application.

[20] Verizon Guerard/Canny Declaration at para. 78.

to the UNE Remand Order, but that Verizon refuses to provide Covad. The manual loop qualification is not the process by which Verizon investigates engineering records and plats – that is a separate "engineering query" that is not part of the manual loop qualification process. In sum, the "manual loop qualification" process is actually what should be a prequalification inquiry submitted by Covad's own technician electronically directly into Verizon's databases, but is not. Rather, Verizon forces Covad to perform what should be a prequalification function through the ordering process, on the LSR, rather than through the pre-ordering process, through an OSS inquiry. Covad pays extra for this manual loop qualification, and in requesting such a manual loop qualification (in order to access the loop make-up information that Verizon denies to Covad otherwise) Covad must wait an extra three days for loop delivery. All of this could be a simple 30 second pre-order OSS inquiry, but Verizon refuses to comply with the Commission's rules.

Does the manual loop qualification process excuse Verizon's on-time loop performance of only 51%? Of course not. At the outset, neither Verizon nor the Massachusetts DTE made any effort whatsoever to ensure that Verizon's "study" of its on-time loop performance was accurate. Covad never had the opportunity to challenge this "study" before the DTE, because Verizon conducted it for its FCC application, and never presented it before the state commission. Verizon purported to conduct a study of 412 "randomly selected "w" coded xDSL loop orders from June and July, and then further "examined the pre-qualified loops separately from those that required manual loop qualification."[21] Verizon is attempting to establish that its ability to meet the six-day loop provisioning interval that Verizon itself agreed to only 51% of the time, as

reflected by PR 3-10, is not a true reflection of its on-time performance. As such, it examines the non-pre-qualified loops (manual loop qualification loops) separately in order to demonstrate that it meets the nine-day interval for those loops.

First, as to pre-qualified loops, Verizon claims that its study shows that its average completed[22] interval in July was 5.40 days.[23] This obviously contrasts with PR 3-10, which for July shows that Verizon met the six-day interval only 51% of the time (keeping in mind that PR 3-10 excludes all customer and CLEC-caused issues, and many Verizon-caused issues, such as facilities). Which figure accurately portrays Verizon's performance? PR 3-10 is the official metric, and Verizon's study is a sample of something less than 412 loops (because remember the 412 number is for both June and July, and includes both prequalified and non-prequalified loops). Indeed, Verizon's compilation of on-time performance, pursuant to PR 3-10, demonstrates that it delivered loops in six days or less only 51% of the time in July 2000. Verizon's assertion it "completed wholesale xDSL orders involving pre-qualified loops more quickly than it completed retail Infospeed orders, and more quickly than it committed to do so" is thus facially invalid.[24]

Verizon then examines wholesale xDSL orders that required loop qualification. In July 2000, Verizon claims that it completed loop delivery of these manually qualified

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[21] Verizon Guerard/Canny Declaration at para. 79.
[22] Verizon also shows "average interval offered," but as discussed above, the interval offered is irrelevant so long as Verizon fails to deliver the loop in the interval in which it is required to deliver it. "Average interval offered" is simply a measure of what Verizon promised, whereas loop delivery interval is the interval that Verizon actually delivered. Actual loop delivery is what matters most to Covad, as it demonstrates both how long it takes Covad to get a loop, and that Verizon does not keep the promises it makes in the "average interval offered."
[23] Verizon Guerard/Canny Declaration at para. 80.
[24] *Id.*

loops in an average of 6.55 days.[25] The number of observations for this figure: 55 loops.[26] In the "official metric," PR 3-10, Verizon's 51% on time performance is reported on 723 observations for July 2000.[27] Interestingly, Verizon doesn't explain how the "official" results are actually altered by its own "unofficial" study of these 55 loops for which CLECs requested manual loop qualification. Presumably, Verizon would like the Commission to conclude that Verizon's 51% on-time performance on 723 observed loop orders, when reduced by 55 loop orders (55 represents only 13% of the 723 observations) for which Verizon averaged a 6.55 day interval, the resulting "new" performance data will reveal performance much better than the 51% on-time performance that the "official" data reveals. It would be interesting to see if Verizon simply pulled those 55 orders out of the 723 it reported on for PR 3-10, whether its on-time performance would improve. That would seem to be the logical thing to do, given Verizon's contention that PR 3-10 is "tainted" by the presence of manual loop qualified loops. But is wasn't done, so we just don't know.

Next, Verizon conducted its own "examination whether CLECs providing DSL services are getting service when they want it."[28] Reviewing 7,851 LSRs issued by eight DLECs in June and July, Verizon concluded that, factoring in the correct interval (6 or 9 days, depending on prequalification of the loop), "Verizon confirmed the CLEC's requested due date or the correct interval for 97.7% of the LSRs."[29] Sounds great, right?

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[25] Verizon Guerard/Canny Declaration at para. 81.
[26] Verizon Guerard/Canny Declaration at Attachment K, "new" metric PR 2-02. It is vital to note that these metrics, although printed out to appear in the same format as the official Commission-approved metrics, are far from it. (Verizon even goes so far as to use the same "Carrier to Carrier" metric designation on its attachment, as if using the same designation somehow imparts legitimacy to figures that Verizon created itself.)
[27] Verizon Guerard/Canny Declaration at Attachment E, p. 38.
[28] Verizon Guerard/Canny Declaration at para. 82.
[29] *Id.*, and Attachment L.

Verizon's reported metrics show 51% on time loop performance, but its own internal data shows that 97.7% of the time competitive LECs are "getting service when they want it."[30]

Well, that's not what the data shows. Although Verizon's clever phraseology attempts to conceal it, the 97.7% figure is not on-time loop performance. It simply measures Verizon's FOCs. What's a FOC? It's a commitment from Verizon to install a loop on a particular date. It is not the actual installation date, nor does it indicate whether Verizon actually installed the loop on the day it said it would. So what does it mean that Verizon states that it "confirmed the CLEC's requested due date or the correct interval for 97.7% of the LSRs"? It means that Verizon told the competitive LEC that it would provide the loop on the date that the competitive LEC wanted it, or on the date Verizon was required to provide it, 97.7% of the time. Does it mean Verizon *actually delivered* the loop when it said it would? Of course not. All it means is that Verizon promised the requesting LEC that Verizon would deliver a loop on a particular day. Does Verizon actually deliver those loops when it is supposed to? Verizon's own metrics show that it most certainly does not. In addition, as detailed in Covad's confidential Attachment G, the reports that Verizon provides Covad in Massachusetts for its on-time loop performance demonstrate equally conclusively that Verizon rarely meets its committed loop delivery date.

As discussed in detail in Covad's initial comments, Verizon's excuse for poor loop provisioning performance is that competitive LECs are requesting manual loop qualification when submitting LSRs to Verizon. Verizon did provide to Covad a chart purporting to reflect "the number and percentage of orders for xDSL services where the

[30] *Id.*

CLEC pre-qualified the loop before sending the order to Verizon."[31] In that chart, Verizon states that 80% of the LSRs that Covad submitted to Verizon during the month of July 2000 were "prequalified." This suggests that the remaining 20% of the LSRs Covad submitted to Verizon were not prequalified.

What does it mean to submit a prequalified LSR? It means that the LSR had a box checked on it saying that Covad ran the Verizon loop prequalification tool and got the yellow, red or green light back from Verizon. A non-prequalified LSR means that Covad ran the prequalification on the loop and got a questionable response back requiring further information on the loop. Because Verizon does not provide loop makeup information as required by the *UNE Remand Order*, Covad must ask Verizon to check the loop makeup information on Covad's behalf. This requires checking a box for "manual loop qualification" on the LSR. Importantly, Verizon will reject the LSR automatically if either one or the other box is not checked.

If 100% of the LSRs submitted by competitive LECs were "prequalified," Verizon would agree that its on-time loop performance for July 2000 was only 51%. The only issue Verizon raises is that it was not required to deliver a loop in the six-day interval if an LSR was marked for manual loop qualification, in which case Verizon was entitled to a nine-day interval. As noted above, Verizon contends that its "random sample" of xDSL loop orders (somewhere less than 412 orders) requesting manual loop qualification found that such loop orders were completed, on average, in 6.55 days in July 2000.[32] Is this a fair sample? Hard to say, because Covad (and the FCC, for that

[31] *See* Proprietary letter to Magalie Roman Salas, Secretary, FCC, from May Chan, Director, Federal Regulatory, CC Docket No. 00-176, provided to Jason Oxman, Covad Communications Company, via fax on October 25, 2000.
[32] Verizon Guerard/Canny Declaration at para. 81.

matter) has no idea what loop orders Verizon looked at, how many were in this sample, what statistical significance that number has, and whether those loop orders are actually already captured properly by PR 3-10.

Does Covad use the manual loop qualification tool? Yes, on occasion. Verizon submitted a chart to Covad (which Verizon filed confidentially in this docket) which concludes that in July 2000, 80% of the LSRs submitted by Covad to Verizon used the prequalification tool, and were thus subject to the six-day interval.[33] Does this mean that 20% of the loop orders submitted by Covad to Verizon under this Verizon study requested manual loop qualification, thus entitling Verizon to a nine-day interval? Perhaps – the data doesn't actually say. Assuming for argument's sake that such is Verizon's intent, there is a problem with its figures. The total number of LSRs submitted by Covad in July 2000 – the numerator in Verizon's 80% calculation – includes "LSRs confirmed or rejected during calendar month." Thus, each LSR in Verizon's numerator doesn't necessary equal a separate loop order – it could be an LSR rejected back to Covad for an address correction or similar error (or, perhaps for failure to check the loop qualified/manual loop qualification box, which results in a rejection), meaning some of the LSRs are counted twice. Second, Covad has had no opportunity to review the LSRs in question to determine whether Verizon's count is accurate, and that Covad was in fact requesting manual loop qualification. Finally, if Covad really did request manual loop qualification in 20% of the LSRs submitted, and those 20% were all loop orders (not duplicate LSRs), then why didn't Verizon simply back out those 20% from the PR 3-10 metric and show how often it met the six-day interval for the remaining loops? Instead,

Verizon goes through the effort to count all the Covad and other CLEC LSRs that purportedly requested manual loop qualification, and then instead of using that data for any purpose other than rhetoric, Verizon proceeds to do a random sampling of some small number of CLEC orders (somewhere under 412 – and not even CLEC specific) to determine the interval in which it provisioned manually qualified loops. Why this huge gap between purported findings? Perhaps Verizon discovered than backing out 20% of its orders from the PR 3-10 performance metric didn't quite fix its 51% on time performance problem. We may never know.

Finally, Verizon refers to a different set of performance measures entirely – PR 4-14 through 4-17 – to claim that its on-time performance is up to snuff. Indeed, for the month of July 2000, Verizon reports 90% or greater on-time performance for these performance measures. But what exactly is Verizon reporting in these measures? As it turns out, the business rules for these metrics reveal that Verizon is reporting its on-time performance for loops that it completed on time. Sound tautological? It is.

The business rules for PR 4-14 state that the numerator of the metric is "count of all orders completed on or before the due date with CLEC serial number and DD-2 test."[34] The denominator is "count of completed orders where the CLEC provided an 800 number and due date –2 results."[35] Thus, these measures are designed to show whether Verizon is acceptance testing loops with competitive LECs.[36] They are not designed to

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[33] *See* Proprietary letter to Magalie Roman Salas, Secretary, FCC, from May Chan, Director, Federal Regulatory, CC Docket No. 00-176, provided to Jason Oxman, Covad Communications Company, via fax on October 25, 2000.

[34] Verizon Guerard/Canny Declaration at Attachment B, p. 52.

[35] *Id.* PR 4-15 through 4-18 all have essentially the same definitions (i.e. loop completed on or before the due date in the numerator, and loop completed in the denominator), with the only difference being whether or not the CLEC provides a serial number or due date – 2 test.

[36] Importantly, the acceptance testing process is no guarantee that the loops that Verizon claims Covad accepted as "good" actually work. See Declaration of Wanda Balthrop, *infra* at Attachment D.

show Verizon's on-time performance. We know this because the business rules do not exclude customer and CLEC-caused completion delays.[37] Loop acceptance testing is scheduled on or before the loop due date – indeed, the numerator of all of these PR 4 performance measures cited by Verizon exclude any loops that were not "completed on or before the due date."[38] The denominator is similarly limited – if a CLEC provided a due date –2 test and 800 number for acceptance testing, that loop was acceptance tested on or before the due date. Thus, with a few exceptions thrown in for good measure (100% on-time performance probably wouldn't pass the straight face test), Verizon is effectively reporting on those loops that it completed on time by counting the loops that it completed on time and excluding from the count those that it didn't.

In order to assist the Commission in its attempt to discover Verizon's true performance, Covad is providing, in a confidential attachment to this pleading, a copy of the so-called "FOC + 1" reports provided each day by Verizon to Covad.[39] Each day, Verizon provides Covad with a report – called the "FOC +1" (firm order commitment date plus one day) report, which delineates all of the loop orders due the prior day (pursuant to Verizon's own committed due date) that Verizon failed to deliver. In other words, on the day after Verizon's committed due date (i.e. FOC +1), Verizon sends Covad a spreadsheet listing each of the loops it had committed to deliver the day before, and listing whether the loop was delivered or not. If the loop was not delivered on the due date, Verizon also tells Covad in the report why the loop was not delivered. Thus, the FOC + 1 daily report is Verizon's own data, and includes Verizon's own "code" for

[37] *Id.* at p. 49.
[38] *Id.* at 52.
[39] Unfortunately, such FOC + 1 data, although provided daily to Covad, has not been provided to the Commission by Verizon. No performance metric captures this data, and Verizon has not volunteered it.

why the order was missed. For example, if Verizon failed to complete the loop order on time because of "no access" or "facilities" issues, Verizon states so on the FOC + 1 report.

The FOC + 1 report, attached to the confidential affidavit of Dennis Schmidt, is thus Verizon's *own data* reporting on whether it met its own committed loop delivery date or not.[40] The report shows how truly terrible Verizon's performance is. Importantly, the report also demonstrates how often Verizon misses loops for "no access" or other customer reasons, highlighting the need for Verizon to fix the underlying problems with its loop delivery processes and procedures, not just fix its metrics.

Linesharing

In an *ex parte* letter dated October 27, Verizon clarified, in response to the Commission's request, the following: "When Verizon says that it has prepared 100 percent of the central offices for line sharing what does that mean?"[41] Such a representation by Verizon is, obviously, vital to its claim that it is in full compliance with the Commission's linesharing rules – linesharing is a UNE, and Verizon has a checklist obligation to provide nondiscriminatory access to UNEs. So when Verizon "clarifies" that in saying "it has prepared 100 percent of the central offices for line sharing" it actually meant only that it has completed splitter installation "for the priority wire centers indentified by the CLECs" – how could the Commission not be incensed at such a misrepresentation? Verizon informed Covad and other CLECs that it would not be able to prepare central offices for linesharing by the June 6, 2000, FCC deadline, and

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This is particularly odd, because it is Verizon's own data, and it demonstrates just how often they really deliver a loop on time.

[40] See Covad Reply Comments at Attachment G.

instructed CLECs to provide a "priority" list of those offices that it wanted completed first. Covad obviously wanted *all* of its central offices completed by June 6, but provided the priority list in order to ensure that at least *some* of them would be completed. And now, Verizon concedes that the priority list – 81 of the 237 central offices in Massachusetts in which CLECs are collocated – is all that Verizon completed. And as Covad detailed in its initial comments, simply completing splitter collocation work in no way means Verizon is providing nondiscriminatory access to the linesharing UNE.

Such a misrepresentation -- claiming "100% completion" without disclosing that it was actually only 100% of a CLEC priority list – frankly brings all of the representations made by Verizon in this application into question.

LFACS access

In its initial comments, and in its October 26, 2000, *ex parte* letter, Covad explained the importance of gaining access to the loop prequalification information that the Commission's rules require Verizon to provide. There is no need to reassert those arguments here. It is necessary to respond, however, to Verizon's assertion that access to its LFACS database, where most loop prequalification information is resident, is unnecessary, because LFACS contains information on only 8-10% of Verizon's loop plant. Covad continues to fight for access to Verizon's loop makeup databases, and the battle is active before the New York PSC DSL collaborative, where Verizon is in the process of formulating proposals for granting competitive LEC access to such information, but is not yet providing it.

[41] Letter from Dee May, Executive Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 00-176 (Oct. 27, 2000).

Indeed, Verizon's 8-10% estimate is an attempt to distract from the real issue: Verizon is simply not providing Covad access to any loop makeup information. It refuses to comply with the *UNE Remand Order* by providing direct access to loop information (not red and green lights[42], not the ability to ask a Verizon technician to do a loop makeup inquiry for Covad).[43] Covad is entitled to access to whatever loop makeup information Verizon possesses, regardless of the percentage.[44] Such pre-ordering information is vital to competition, because "[c]ompeting carriers need access to this information to place orders for the products or services their customers want."[45] In addition, the Commission should be wary of what Verizon means by 8-10% LFACS coverage. Because it is unlikely that Verizon actually examined the number of loops that are in LFACS, it is probable that Verizon is referring to the numbers of terminals that are covered in LFACS. A terminal is an intermediate connection point on the loop, such as a

[42] Verizon must provide access to loop prequalfication information regardless of where that information resides in the incumbent LEC's network, and regardless of whether the incumbent LEC's retail operation uses such information. *UNE Remand Order* at para. 430.

[43] Pursuant to the *UNE Remand Order*, Verizon is obligated to provide "nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install. Based on these existing obligations, we conclude that, at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records. For example, the incumbent LEC must provide to requesting carriers the following: (1) the composition of the loop material, including, but not limited to, fiber optics, copper; (2) the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; (3) the loop length, including the length and location of each type of transmission media; (4) the wire gauge(s) of the loop; and (5) the electrical parameters of the loop, which may determine the suitability of the loop for various technologies. Consistent with our nondiscriminatory access obligations, the incumbent LEC must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code, or on any other basis that the incumbent provides such information to itself." *UNE Remand Order* at para. 427.

[44] Indeed, Verizon actively concedes that there is useful loop prequalification information in its LFACS database, yet it still refuses to provide such information directly to CLECs. *See, e.g.*, Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000 , DTE 98-57, Phase III, at p. 23 n.13 ("Verizon states that LFACS may contain information regarding the presence or absence of load coils, bridged taps, the length and gauges of the copper cables, and whether the loop is on digital loop carrier.").

feeder/distribution interface. If 8-10% of Verizon's terminals are inventoried in LFACS, that is much different that 8-10% of its loops – indeed, in urban areas, a single terminal can contain hundreds of loops.[46] In a rural area, by contrast, a single terminal may cover only one loop. Thus, if the 8-10% of the terminals in Verizon's LFACS database are in urban areas, that could cover hundreds of thousands of loops.[47] The Commission must inquire in detail into exactly what Verizon is hiding in its back office OSS.[48]

Conclusion

What should the Commission do now? Should it, as it did with Southwestern Bell's Texas application, encourage Verizon to withdraw its application until such time as it can fix its numbers, and then resubmit a new application a few weeks later, forcing us all to do this all over again? Or should the Commission take a serious look at its "complete when filed" rule[49] and ask Verizon to actually fix the problems that are preventing Covad and other DSL providers from competing in Massachusetts.

The Commission should be particularly attentive to DSL issues in Verizon's region, given Verizon's pending acquisition of Northpoint. Verizon has more incentive

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[45] *Second BellSouth Louisiana 271 Order* at ¶ 94.

[46] For example, SWBT in Texas, in a hearing presided at by Administrative Law Judge Kathy Farroba, stated on the record that as much as 25% of its loop plant is inventoried in LFACS and thus contains loop makeup information in SWBT's OSS. See Transcript, *infra*, at Attachment F. This further brings in to question Verizon's low estimate. *See also* Covad Szfraniec Declaration, *infra* at Attachment C.

[47] The Commission should be particularly wary of this Verizon representation, given Verizon's representation (discussed above) that "it has prepared 100% of the central offices for linesharing" when in fact it had only completed 100% of a CLEC priority list, not 100% of the central offices. This misrepresentation raises the question of the validity of any representation made by Verizon in this proceeding.

[48] In October of this year, Verizon submitted to Covad the results of a sample of Covad in-service loops that Covad had asked Verizon to query in its LFACS database. The purpose of the exercise was to determine what percentage of Covad's loops actually had loop makeup information in LFACS. Surprisingly, approximately 80% of the sample of loops (about 275 loops) that Covad asked Verizon to query were returned to Covad with loop makeup information. *See* Declaration of Bogdan Szfraniec at Attachment C.

[49] "The rule has enabled us properly to manage our own internal consideration of the application and ensures that commenters are not faced with a "moving target" in the BOC's section 271 application." SWBT Texas Order at para. 36.

than ever to suppress competitive DSL entrants in Massachusetts – it just bought one. Northpoint has the potential to become a tool of incredible discrimination, unless the Commission insures that Verizon is providing nondiscriminatory access to loops and its OSS before Verizon controls a former data CLEC. With such control, Verizon will be able to channel its discriminatory behavior to Northpoint's benefit, and the Commission's approval of the instant application will set the bar for Verizon's performance so low (51% on-time loop performance) that Northpoint will enjoy the fruits of Verizon's discrimination for years to come. Moreover, if the Commission approves this application without requiring Verizon to fix its discriminatory no-access policies (only a problem for Verizon 3% of the time, versus 59% for CLECs), Verizon will leverage its Northpoint acquisition into even greater dominance in the DSL market. CLEC customers, forced to accept all-day appointment windows from Verizon, will face appointments that result in no appearance by a Verizon technician 59% of the time, whereas Verizon/Northpoint customers will only face such a scenario a measly 3% of the time. Thus, this application is about more than just long distance – it is about the future of the data CLEC industry. Given the rough time that many CLECs are facing in the market today, this is no hypothetical.

Covad submits that the Commission risks "lowering the bar" on DSL performance so low that competitive LECs like Covad, carriers that rely on the 271 process as the most effective incentive for BOCs to comply with their obligations under the Act, may suffer irreparable harm across the country. Lowering the bar in this decision means lowering the bar not just for Verizon in Massachusetts, but for every other BOC in every other state yet to receive section 271 authorization. This is the

simple choice the Commission faces. The Commission must take a firm and definitive stand in favor of competition: spell out clearly for Verizon that it must fix its loop provisioning problems (all of them, not just those that will clean up their metrics), and that it shouldn't come back with a new application until all those problems are fixed.[50] That is, after all, what the section 271 process is supposed to be all about.

Finally, it is important to note that the Commission's traditional reliance on the nation's antitrust laws – and, indeed, the Commission's reliance on Verizon's representations that such laws will deter and prevent backsliding by Verizon – has been brought into serious question by Verizon itself in a recent court filing.

As detailed in a letter from Covad to FCC General Counsel Christopher Wright on September 15, 2000, Verizon has moved to dismiss Covad's pending antitrust case on the basis of the Seventh Circuit's recent decision in *Goldwasser v. Ameritech Corp.*[51] In *Goldwasser*, the Seventh Circuit held that conduct by an ILEC constituting, or "inextricably linked,"[52] to the ILEC's violations of its duties under the Act cannot constitute the exclusionary behavior that is necessary to prove a violation of Section 2 of the Sherman Act. Alternatively, the court held that even if the plaintiffs' allegations did constitute Section 2 violations, the existence of an antitrust remedy would conflict with the Act, thus precluding antitrust enforcement.

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[50] Verizon cannot claim that these issues are new to it, nor can it claim that there is no real forum for addressing these issues. The Bell Atlantic User Group (BAUG), a monthly collaborative session between Verizon and its wholesale customers, the CLECs, is a forum where CLECs raise the issues and difficulties they are having with Verizon's performance. As the minutes (prepared by Bell Atlantic itself) from the May 16, 2000, meeting reveal, Covad has been asking Verizon to resolve loop provisioning problems, access issues, facilities issues, and acceptance testing problems for months – and with no results. *See* Attachment B, *infra*, issues 31-35.

[51] *Goldwasser v. Ameritech Corp.*, No. 9801439, 2000 WL 1022365 (7th Cir. July 25, 2000).

[52] *Id.* at 1022365 * 11.

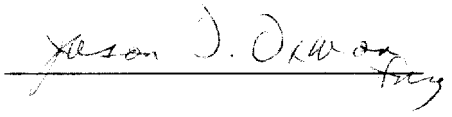
Although purporting to vindicate the Commission's authority, the Court apparently was unaware of the Commission's view that antitrust enforcement is an important component of the totality of remedies that can be relied on to effectuate the Act.[53] Moreover, when Verizon (then Bell Atlantic) sought section 271 approval late last year in New York, it represented to the Commission that even after obtaining 271 authority it would be adequately motivated to comply with the Act because, among other things, it would remain subject to private remedies under the antitrust laws, including treble-damages.[54] Verizon now seeks dismissal of Covad's antitrust case by asserting the exact opposite. The Commission should be extremely concerned about Verizon's legal position that the nation's antitrust laws simply do not apply to its Telecommunications Act-mandated obligations. Given the Commission's past reliance on these same antitrust laws as protection against Verizon's backsliding, the Commission should be fully aware that Verizon does not believe itself subject to those laws. As such, the Commission should not rely solely on those laws to protect against Verizon's anticompetitive conduct, particularly in the face of such clearly discriminatory treatment of competitors in Massachusetts.

[53] *Bell Atlantic New York 271 Order* at para. 430 ("Furthermore, Bell Atlantic risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner.").
[54] Id., 430, n. 1320.

Conclusion

For the reasons stated herein, the Commission should reject Verizon's application pursuant to section 271 of the Act for authority to offer in-region interLATA service in Massachusetts.

Respectfully submitted,



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